Supreme Court, U.S.
FILED
MAY 24 1993
OFFICE OF THE CLERK

No. 92-1742

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AMERICAN HOME ASSURANCE COMPANY,

Petitioner,

vs.

REPUBLIC INSURANCE COMPANY and
UNITED NATIONAL INSURANCE COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals committed reversible error when, upon its application of settled law to the undisputed facts of this case, it concluded that the notice provided to Republic Insurance Company ("Republic") and United National Insurance Company ("United National") was untimely as a matter of law.[1]

[1] All parties to this action are reflected in the caption.

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OPINIONS BELOW

United States District Court Judge Morris E. Lasker granted summary judgment to Republic and United National in a decision reported at 788 F. Supp. 214 (S.D.N.Y. 1992). The United States Court of Appeals for the Second Circuit affirmed Judge Lasker's decision in all respects, as reported at 984 F.2d 76 (2d Cir. 1993).

JURISDICTIONAL STATEMENT

The matter is before the Court on the American Home Assurance Company's ("American Home") Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered on January 22, 1993. American Home has invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Petitioner has already set forth Rule 56 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1332. In addition, the matters raised by Petitioner also involve New York Insurance Law § 3420(d) (McKinney's 1985) which provides, in pertinent part:

> (d) If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.

STATEMENT OF THE CASE

Republic and United National oppose American Home's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 22, 1993, on the grounds that such petition wholly contradicts settled law and misstates relevant facts.

A. Procedural History Below

The Honorable Morris E. Lasker determined untimely as a matter of law American Home's indisputable delay of more than 10 and 13 months to provide notice to United National and Republic of five tragic deaths by asphyxiation two days before Christmas 1985.

The Second Circuit characterized Judge Lasker's opinion as "comprehensive and well reasoned."

Addressing precisely the same arguments below as American Home now raises in its petition to this Court, the Second Circuit:

(a) chastised American Home for its "specious assertion of lack of diversity" jurisdiction; (A. 4.)[2]

(b) found that "American Home's misconstruction" of the New York Court of Appeals opinion in *Unigard Security Ins. Co. v. North River Ins. Co.*, 594 N.E.2d 571 (N.Y. 1992) "has equally little to recommend it" (A.5.); and

(c) concluded that "American Home's remaining arguments [all raised herein] are not of sufficient substance or precedential value to even merit discussion." (A. 12.)

With this background and the Circuit's affirmance of Judge Lasker's apt observation that American Home's position in this case wholly contradicts settled law in the Second Circuit and in the State of New York and directly conflicts with American Home's usual position arguing in support of the "no prejudice" rule in every reported decision located, we now briefly consider the pertinent facts below.[3]

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[2] Numerals preceded by the letter "A" refer to pages of the Second Circuit's opinion reprinted in Appendix A of the Petition. Numerals preceded by the letter "B" refer to pages of the District Court's opinion reprinted in Appendix B to the Petition. Numerals preceded by the letter "R" refer to pages of the Record before the Second Circuit, specifically the Joint Appendix before that Court.

[3] For example, before the Second Circuit in *Olin Corp. v. Insurance Company of North America*, 743 F. Supp. 1044, 1045 (S.D.N.Y. 1990), *aff'd*, 929 F.2d 62, 64 (2d Cir. 1991), American Home argued, on the ground that the coverage provided by an excess insurance policy issued to Olin was vitiated by Olin's late notice, that it did not have to demonstrate prejudice to sustain summary judgment.

B. Statement of the Facts

1. Knowledge of Mobile Gas of the Lethal Condition that Caused the Tragic Deaths

The Second Circuit properly affirmed Judge Lasker's well-reasoned finding that "the insured company, Mobile Gas Service Corp., earlier had detected the furnace's improper installation, but had failed to correct the problem." (B.5.)(R. 134-135(a).)

2. The McDonald Tragedy

On a similarly undisputed record below, the Circuit Court did not dispute the District Court's finding that:

> The events underlying this dispute are tragic. On or about the morning of December 23, 1985, five people – a young couple, their infant child and the wife's parents – died in their home as a result of carbon monoxide poisoning caused by an improperly installed gas furnace.

(B. 4-5.)

3. Knowledge of Mobile Gas of the McDonald Tragedy

The Circuit Court also properly affirmed on the same compelling record that there "is no dispute" that the insured, Mobile Gas, was aware of "its exposure to substantial liability" in the McDonald/Wilburn deaths by, at the latest, January 10, 1986 – little more than two weeks after the tragedy.[4] (A. 7.) (B. 12.)

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[4] The courts below based their conclusions on, among other things, the undisputed record that at approximately 12:20 p.m. on December 23, 1985, Mobile Gas Vice President of Operations, George M. Yon, was notified that carbon monoxide poisoning killed five persons earlier that morning at 2300 Sybel Drive. (R. 39, 132.) After investigating the scene Yon concluded – ***that very day*** – that the five deaths resulted from accidental inhalation of carbon monoxide produced by the Luxaire heater serviced by Mobile Gas. (R. 39-40, 132-133.) These preliminary findings were confirmed by Yon's further investigation between December 23, 1985 and December 26, 1985. (B. 12.) (R. 40, 134.) (R. 41, 135a.) Not surprisingly, four of the five lawsuits against Mobile Gas were commenced in or about January 1986 (R. 297) and the fifth suit was commenced in or about February 1986. (R. 298.) Each complaint alleged damages of at least $1,000,000. (R. 297-298.)

4. *The Knowledge of Mobile Gas' Insurers Regarding the McDonald Tragedy*

a. The Primary Insurer, Liberty Mutual Insurance Company

Liberty Mutual Insurance Company ("Liberty Mutual") provided primary insurance to Mobile Gas in the amount of $300,000. (B. 8.) (R. 41, 179-180.)

It was undisputed below that Liberty Mutual was placed on notice within days of the deaths.[5] (B. 12.) (R. 41, 151.)

b. The American Home Assurance Company

American Home provided insurance to Mobile Gas as an additional insured under policy BE 194 25 24 for the period June 1, 1985 to June 1, 1986 in the amount of $5,000,000 excess of the $300,000 primary coverage provided by Liberty Mutual. (B. 5.) (R. 42, 181-214.)

Similarly undisputed is American Home's admission that it was informed of the same facts as the insured and Liberty Mutual just one month later on February 12, 1986.[6] (B. 6.) (R. 436-437.)

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[5] The uncontroverted facts were that Inge, Twitty, Duffy & Prince, ("Inge, Twitty") the attorneys appointed by Liberty Mutual to defend Mobile Gas, advised it on January 10, 1986 that "Mobile Gas has exposure in this case." (B. 12) (R. 42, 166, 169.) Later reports only amplified these early warnings. (R. 215-252, 259-261.) Moreover, Liberty Mutual, Mobile Gas and American Home necessarily knew of the largesse, even by New York standards, of Alabama juries and the substantial likelihood that the claims in this tragedy would exceed the $5,300,000 threshold of the Republic and United National policies, given the awards (some exceeding $15-25 million for punitive damages) in the years prior to the tragedy noted in the record below. (R. 477-478.)

[6] American Home was advised by Inge, Twitty that Mobile Gas "was confronted with claims against your insured, Mobile Gas Service Corporation, which are very serious and which carry with them the probability of a huge recovery by plaintiffs at the hands of an Alabama jury." (B. 13.) (R. 43, 215.)

(Footnote continued)

In holding that no reasonable jury could find that the delay did not render the notice untimely within the meaning of both insurance contracts, the courts below reasoned on the uncontroverted facts that "it is inconceivable that a reasonable insured or insurance company, much less sophisticated and experienced litigants like Mobile Gas or American Home, could not have realized within days of the deaths of five people, for which Mobile Gas was clearly responsible, that there existed a serious likelihood of recovery over $5,300,000, which would implicate the Republic and United National policies." (B. 16.) (A. 7.)[7]

c. The Republic Insurance Company

Republic provided insurance to Mobile Gas as an "additional insured" under policy CDE 1878 which was in effect for policy year June 1, 1985 to June 1, 1986. Republic provided a $1,000,000 share part of the second excess layer of $10,000,000 excess above the $5,000,000 first excess layer provided by American Home and the $300,000 primary coverage provided by Liberty Mutual.[8] (B. 5.) (R. 44, 74, 77-100.)

Inge, Twitty did not "feel there is any effective defense to these claims on behalf of your insured, Mobile Gas Service Corporation." (B. 13.)(R. 43, 251-252.) Inge, Twitty concluded that "*/t/he probability of an adverse verdict against Mobile Gas Service Corporation in this case is 100%.*" (B. 13.) (R. 44, 245.) [Emphasis in original.] The prior Inge, Twitty conclusions were reemphasized in their Sept. 22, 1986 report to American Home wherein they advance the "probability that these cases can be settled in the $10,000,000 to $15,000,000 range." (B. 13.) (R. 44, 259-261.)

[7] Both the District Court and the Circuit Court found, on a record contradicted only by factually unsupported protests to the contrary by American Home's attorneys, that: (1) an agreement in principal was reached on or about October 23, 1986 – prior to any notice to the other second layer excess insurers – between plaintiffs' counsel and American Home to settle the underlying suits for $12,500,000 (A. 9.) (B. 15.); (2) plaintiffs agreed to reduce the amount of the settlement to $11,500,000 to avoid litigation after American Home attempted to repudiate the settlement (A. 14.) (B. 6); and (3) American Home concealed from the other second-layer excess carriers (including Republic and United National) the agreement in principal reached with plaintiffs on October 23, 1986. (A. 8-9.) (B. 14.) (R. 48, 67, 179, 273, 275.)

[8] American Home also provided $4,000,000 in coverage in the second excess layer. (B. 5.) (R. 435.)

On the settled facts below, the District and Circuit Courts concluded that United National and Republic were not made aware of the occurrence until November 10, 1986, and January 21, 1987, respectively. (A. 8-9.) (B. 15.)[9]

No document satisfying the notice requirement was located in Republic's files or the files of its agent, Cravens Dargan & Company. (B. 14-15.) (R. 44, 75.) The first document purporting to be notice of any kind received in this matter by Republic is a "Reinsurance Advice" dated October 28, 1986, received as an attachment to a letter from American Home dated January 30, 1987. (B. 15.) (R. 44, 75.)[10]

The insured itself never gave notice to Republic. (B. 6-7.) (R. 45-46, 75.) Thus, Republic did not receive information regarding any claim until almost 13 months after the insured Mobile Gas learned of and admitted its culpability for the five deaths in Mobile, Alabama. (B. 15.) (R. 44, 75.)

d. The United National Insurance Company

United National provided insurance to Mobile Gas as an additional insured under policy XTP 11054, for policy year June 1, 1985 to June 1, 1986, in the amount of $1,000,000 quota share part of $10,000,000 excess of $5,000,000 excess of $300,000 primary insurance. (B. 5.) (R. 46, 54-66, 70.)

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[9] As determined below, Mobile Gas was insured only to the extent it satisfied various conditions precedent under the policy, including the condition obligating Mobile Gas to give written notice "as soon as practicable" upon its awareness of "information from which [Mobile Gas] may reasonably conclude that an occurrence . . . is likely to involve this policy." (B. 7.) (R. 81.) United National's policy contained a provision with the same legal import. (*See*, Condition 2 of the United National policy obligating Mobile Gas to give written notice "immediately" upon becoming aware of any occurrence "that may result in a claim." (R. 58.))

[10] The first Republic ever heard of a suit was on or about January 21, 1987 when Mr. Jerry Hart of Transco Insurance Services (a representative of United National) called to inquire about how Republic planned to respond to American Home's settlement of the matter. (B. 14-15.) (R. 45, 74-76, 101, 429.)

No document satisfying the notice requirement was located in United National's files or the files of its agent Transco Insurance Services ("Transco"). (R. 46, 71.) More than 10 months after the insured both realized and admitted its culpability for the five deaths in Mobile, Alabama, United National received on November 10, 1986 the first document purporting to be notice of any kind, a "Reinsurance Advice" sent by American Home dated October 28, 1986. (B. 15.) (R. 46, 71-72.) (R. 67, R. 52.)

The insured itself never provided notice of any kind to United National. (B. 6-7.) (R. 46, 72.)[11]

e. The Other Second Layer Excess Insurers

Apparently, the other second-layer excess insurers — except of course American Home (which was put on notice almost immediately) and Republic (which was not informed until late January 1987) — received what purported to be notice in much the same way as United National. Both the Bauman letter's direction to "all reinsurers" (R. 44-45, 67.) and American Home's admitted "goof" in thinking the second-layer excess insurers were American Home's reinsurers evidence how and when notice was received by United National and the other second-layer excess insurers. (B. 14.) (R. 47, 179.)

C. American Home's Suit Against Republic and United National

When Republic and United National refused to pay for American Home's unilateral and unauthorized settlement, American Home sued in New York State court. Republic and

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[11] Shockingly, American Home raises as fact before this Court the same unsupported contentions regarding notice raised below (at pp. 5-6 of its petition) and thus disregards the record and blissfully ignores the decisions of the courts below, both of which found American Home's purported statements of fact to be little more than unsupported flights of fancy. (A. 8.) (B. 11-12.)

United National removed this action to federal court based upon diversity jurisdiction on or about June 16, 1990.[12]

ARGUMENT

POINT I

AMERICAN HOME'S PETITION IGNORES THE CLEAR MANDATE OF SUPREME COURT RULE 10

In a baseless attempt to obtain review by this Court, Petitioner ignores the letter and spirit of Supreme Court Rule 10 by resting on a petition that misstates fact and law. While we discuss some of American Home's arguments in slightly more detail below, at the outset we dispose of the more frivolous points.

For example, American Home again raises before this Court its tired and frivolous jurisdictional argument, this time embellishing it with an equally tortured conflict of law analysis. (*See, e.g.*, Petitioner's Brief pp. 38-45.) Given American Home's clear assertion in its complaint of the diversity of the parties, the Second Circuit properly disposed of the "diversity" argument as "specious," and choice of law was not raised as an issue below. (A. 4.)[13] It therefore exceeds the bounds of rational thought that American Home raises the issue here.

Moreover, by erroneously referring to the rules described in *Neumeier v. Kuehner*, 286 N.E.2d 454, 457 (N.Y. 1972) which apply in tort cases, American Home misstates New York's choice of law rule for contract actions (that courts must apply the law of the jurisdiction which has the most significant interest in the

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[12] As noted by the Second Circuit, American Home is the only party in this action that is a citizen of the State of New York. (A. 4.) Republic is a Delaware corporation, with its principal place of business in Dallas, Texas and United National is a Pennsylvania corporation, with its principal place of business in Philadelphia, Pennsylvania. (R. 277-279.)

[13] Save for one Connecticut case, American Home cited only to New York law in its brief submitted to the District Court.

dispute. *Israel Discount Bank v. Rosen*, 452 N.E.2d 1213, 1215 (N.Y. 1983)).[14]

Incredibly and despite an uncontroverted record and settled law to the contrary, American Home also argues to this Court that:

(a) "[t]he 'prejudice' issue as applicable to excess carriers is one of first impression before the courts of the State of New York" (Petitioner's Brief 7-8.);

(b) the holding below will have a profound and adverse effect on the New York State insurance industry (*Id.* 12-17);

(c) the decision below "[c]onflicts with decision (sic) of New York Court of Appeals" (*Id.* 17-24.); and

(d) the decision "is in conflict with decisions of the Second Circuit and other circuits." (*Id.* 25-30.)

These frivolous misstatements of law and fact reveal the failure of American Home's petition and warrant only the briefest response:

(a) Numerous New York courts analyzing New York law have held the "no prejudice" rule applicable to excess insurers – including cases where American Home has argued itself as an excess carrier in favor of the rule. Discussed at length in the Second Circuit and District Court opinions these rulings need not be restated here. (A. 8-9.) (B. 9.);

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[14] New York's Court of Appeals has expressed a strong interest in regulating commercial transactions which take place largely within its boundaries. *Rosen*, 452 N.E.2d at 1215. Here, the principal insured (Stone & Webster) has its principal place of business in New York and all or most of the policies were negotiated and executed in New York.

(b) American Home never argued its illogical and unsubstantiated public policy notions below and wholly ignores New York's clear public policy as reflected in the settled case law cited by the Second Circuit. (A. 8-9.);

(c) American Home's characterization of the Second Circuit as "embellishing" New York law (Petitioner's Brief 20.) is, as noted above, disingenuous at best and frivolous at worst;

(d) no federal or state decision interpreting New York law on this issue has failed to recognize the applicability of the no prejudice rule to excess carriers, notwithstanding American Home's mistaken reference to federal decisions interpreting the law of states other than New York and its self-serving reference to two apparently related cases brought by American Home in the New York State courts, neither of which, contrary to American Home's position here, present rulings in conflict with the holdings below and the settled New York law (*See e.g., Loblaw, Inc. v. Employers' Liability Assurance Corp.*, 442 N.E.2d 438, 442 (N.Y. 1982) (excess insurer); *Imparato Stevedoring Corp. v. Lloyd's Underwriters, et al.*, 278 N.Y.S.2d 153, 154 (N.Y. App. Div. 1967) (excess insurer); *Keegan v. Excess Insurance Company of America*, 116 N.Y.S.2d 687, 690-691 (N.Y. Sup.Ct. 1952) (excess insurer). American Home's transparent attempts to invent an issue of sufficient merit to warrant review along the lines of those suggested by the Court in Sup. Ct. R. 10 bears little further comment.

American Home concludes its petition by apologizing to this Court for attacking the Second Circuit because of its characterization of American Home's argument as "specious" with "equally little to recommend it" and "not of sufficient substance or precedential value to even merit discussion." We

submit that American Home's advancement of the identical, equally tortured arguments before this Court ought to be characterized similarly and constitutes an inconceivable and sanctionable waste of this Court's resources and those of the parties. (A. 4-5, 12.)

POINT II

AMERICAN HOME OFFERS NO GROUNDS FOR REVIEW OF THE SECOND CIRCUIT'S HOLDING THAT THE INSURED'S FAILURE TO GIVE TIMELY NOTICE OF THE OCCURRENCE PRECLUDED COVERAGE UNDER THE REPUBLIC AND UNITED NATIONAL POLICIES

As noted briefly above, the findings below on the late notice issue were made on settled law and an uncontroverted record and thus, respectfully, offer no basis for review by this Court.

Following the Second Circuit's disposition of American Home's jurisdictional argument as "specious," the Circuit Court went on to find that American Home's misconstruction of the settled rule under New York law "ha[d] equally little to recommend it," (A. 5) when it attempted to show that an excess carrier must demonstrate prejudice to prevail on a late notice defense and specifically rejected American Home's arguments that settled law was somehow abrogated by the New York Court of Appeals' opinion in *Unigard Security Ins. Co. v. North River Ins. Co.*, 594 N.E.2d 571 (N.Y. 1992).

The Circuit Court properly observed that the New York State Court of Appeals decision in *Unigard* was limited to a determination that the so-called "no prejudice" rule did not apply to reinsurers unless the reinsurance contract specifically so provided. (A. 5.) The New York State Court of Appeals left undisturbed the long settled rule in New York that the no prejudice rule applies to all "primary" insurers – that is, all direct insurance carriers – both first layer and excess. (A. 5-7.) American Home argued below, as it does here, that the *Unigard* Court intended to distinguish between excess and first layer carriers by using the word "primary." (A. 6.) The Second Circuit

properly concluded that such an argument "overlooked the well-established rule of construction to the effect that words can take on different meanings in different contexts" and thus the Second Circuit concluded that the New York Court of Appeals in *Unigard* used the word "primary" to refer to all types of insurance, including excess coverage, written directly for the insured's benefit. (A. 6-7.)[15]

A. The "Notice" Provided by Mobile Gas was Untimely as a Matter of Law.

Having disposed of the "construction" and jurisdiction issues, the Second Circuit then turned its attention to Judge Lasker's conclusion: settled New York law mandated that Mobile Gas' failure to give timely notice to United National and Republic vitiated any obligation United National and Republic had under the policies. (A. 8-9.)

Republic and United National respectfully submit to the Court that the Second Circuit properly affirmed Judge Lasker's grant of summary judgment to them on their late notice defenses. (A. 7-9.) Because American Home sued as the equitable subrogee of the insured Mobile Gas, settled New York law provided that American Home had only the same rights as the insured Mobile Gas and thus was subject to any potential defense or claim of lack of coverage raised against the insured. *See e.g.*, *Hartford Accident & Indemnity v. CNA Ins.*, 472 N.Y.S.2d 342, 344-345 (N.Y. App.Div. 1984) ("[a]n insurance carrier, upon payment of a loss, becomes equitably subrogated to the rights and remedies of its assured . . . An equitable assignee or subrogee, however, is vested with no greater or different right or remedy than that possessed by its subrogee." [citations omitted])

American Home, then, effectively stood in the shoes of the insured Mobile Gas. Accordingly, the Circuit Court went on to

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[15] The Circuit Court did not "ignore" American Home's request for certification of this issue to the New York State Court of Appeals as American Home argues here but rather summarily disposed of the certification request, finding it as specious as American Home's jurisdictional arguments. (A. 5.)

determine what rights the insured possessed under the Republic and United National policies. In so doing, the Circuit Court concluded that both the notice provision of the United National policy requiring "immediate" written notice (R. 58, 66.) and the Republic policy requiring notice to be given "as soon as practicable" (R.81.) have almost uniformly been interpreted by the courts as requiring the insured to provide notice within a "reasonable" time of the discovery of loss. *Utica Mutual*, 748 F.2d 118, 121-122 (2d Cir. 1984) ("loss is discovered once an insured has obtained facts that would cause a reasonable person to recognize that there had been [conduct or an event] . . . resulting in loss"); *Commercial Union Ins. Co. v. Int'l Flavors & Fragrances, Inc.*, 822 F.2d 267, 272 (2d Cir. 1987).[16]

In its analysis of the point at which a reasonable person ought to have recognized a loss capable of affecting the second-layer excess insurers, the Circuit Court agreed with the District Court's conclusion that Mobile Gas knew or should have known by January 10, 1986 at the latest that the McDonald tragedy exposed it to "substantial liability." (A. 7-8.) American Home's absurd arguments to the contrary offer no grounds sufficient to warrant review by this Court.[17]

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[16] American Home contended below, despite Judge Lasker's clear finding that the only competent evidence on the issue was provided by Donald Dillon's affidavits, that a different policy jacket than that appended as Exhibit A to the affidavit of Donald Dillon (R. 50-53.) should be the controlling notice provision in the United National policy. (B. 12.) The Second Circuit found American Home's arguments in this regard to be so lacking in merit as to bear no substantive comment. (A. 12.) As if the courts below had never addressed the issue, American Home continues to misstate these facts in its Petition without offering any basis to disturb the findings below. (*See e.g.*, pp. 32-33; p. 12 of Petitioner's Brief.)

[17] For example, American Home illogically argues again before this Court that the $5,000,000 total *ad damnum* clauses in the original complaints support a contrary conclusion. As Judge Lasker observed, the *ad damnum* clauses are clear indicia of the likelihood the claims would far exceed $5,300,000. (B. 12.)

(Footnote continued)

Having established that the obligation to give notice accrued by January 10, 1986, the courts below then correctly applied the settled New York law in concluding that the 10 and 13-month periods of delay were *per se* unreasonable and therefore vitiated any obligations Republic and United National may have had under the insurance policies provided to Mobile Gas. (A. 8-9.)(B. 16-18.) *Deso v. London & Lancashire Indemnity*, 143 N.E.2d 889, 891 (N.Y. 1957) (concluding that the 51-day delay in notifying the insurance company of an occurrence on the insured's property vitiated coverage.); *see also*, *Techlease v. Royal Insurance*, 540 N.Y.S.2d 454, 455 (N.Y. App. Div. 1989) (a nine-month delay found not reasonable as a matter of law); *Power Authority v. Westinghouse Electric Corp.*, 502 N.Y.S.2d 420, 423 (N.Y. App.Div. 1986) (a 53-day delay found not reasonable as a matter of law); *Peerless Ins. Co. v. Nationwide Ins. Co.*, 208 N.Y.S.2d 469, 470 (N.Y. App.Div. 1960) (a four to five-month delay found not reasonable as a matter of law).[18]

Ironically, American Home has itself successfully argued in favor of application of New York's no prejudice rule. For example, American Home argued in *Heydt Contracting v. American Home Assurance*, 536 N.Y.S.2d 770, 772 (N.Y. App. Div. 1989) that the Court below had properly granted summary judgment denying coverage on the grounds of the insured's 4½-month delay.

We also note that Alabama jury verdicts from 1983 through 1986 involving punitive awards far exceed the amounts pleaded by plaintiffs in the underlying case — a fact surely not overlooked by American Home. (R. 475-481.)

[18] Equally specious is American Home's contention that the issue of Mobile Gas' knowledge as of January 10, 1986 was improperly resolved by the District Court. The argument ignores both the uncontroverted record on which the District Court finding was based. (R. 42, 166, 169.) (B. 12.) Moreover, American Home ignores the Second Circuit's careful analysis affirming the District Court's findings, concluding that even if the obligation to give notice did not occur until October 28, 1986 as American Home contends, such notice was nevertheless untimely under settled New York law. (A. 8-9.)

B. American Home's Suggestion That Mitigating Factors Were Present Is Similarly Without Merit

American Home again contends, as it did below, that sufficient mitigating factors excused or explained its delay in furnishing notice. Both the District Court and the Second Circuit rejected this contention out of hand. (A. 12.)(B. 16-17.) Given that American Home suggests no mitigating factor here, we respectfully submit that the Court should summarily dispose of this trivial argument.[19]

POINT III

NEW YORK INSURANCE LAW § 3420(d) DOES NOT APPLY TO THE MATTERS AT ISSUE

American Home contends that somehow United National and Republic waived their late notice defenses for failure to disclaim coverage promptly pursuant to New York Insurance Law § 3420(d), yet fails to offer any basis for disturbing the conclusion reached below regarding the specious nature of its contention.[20] (A. 12.) (B. 18.)

American Home argued below that New York Insurance Law § 3420(d) applied to defeat Republic and United National's late notice defense. (A. 11.) (B. 18.) In response, the Second Circuit reviewed its prior affirmance of *Ogden Corp. v. Travelers Indemnity Co.*, 739 F. Supp. 796 (S.D.N.Y. 1989), *aff'd*, 924 F.2d 390 (2d Cir. 1991), and concluded in "absence of any subsequent

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[19] American Home misleads this Court by arguing that it was deprived of the ability to conduct "proper discovery." (Petitioner's Brief 8, 53.) As the Second Circuit properly observed, this suit was commenced in early 1990. In the substantial time between the commencement of the suit and Republic and United National's motion for summary judgment filed in June 1991, American Home had all the time necessary to conduct discovery. (A. 9-10.)

[20] American Home's reference to the *Marino v. N. Y. Telephone Co.*, 944 F.2d 109, 114 (2d Cir. 1991) decision is unavailing because, as the Circuit Court noted, the circumstances necessary to satisfy the *Marino* exception do not exist here. (A. 11.) *See e.g., Ogden Corp.*, 739 F. Supp. at 803-804.

New York authority to the contrary" that the District Court correctly and properly rejected as meritless American Home's arguments on the disclaimer issue. (A. 11-12.)

The Second Circuit found equally specious American Home's contention that disclaimer by Republic and United National should have been precluded under the common law of the State of New York because Republic and United National's alleged failure to disclaim somehow prejudiced American Home. (Petitioner's Brief pp. 46-53.) In response to these arguments below, the Second Circuit noted that Respondent's subsequent refusal to contribute to an earlier settlement by American Home did not constitute the prejudicial delay in disclaiming required to estop United National and Republic from denying coverage under common law. (A. 11-12.)

Moreover, American Home's status as subrogee makes clear that the issue is not whether American Home was prejudiced by any alleged delay, but rather whether the insured, Mobile Gas, was so prejudiced. *Zurich Insurance Company, et al. v. Travelers Indemnity Company, et al.*, 586 N.Y.S.2d 932 (N.Y. App. Div. 1992); *Eveready Insurance Company v. Dabach, et al.*, 575 N.Y.S.2d 347, 348 (N.Y. App. Div. 1991) (the purpose of the rule is "to avoid prejudice to the insured and injured claimants from delay in learning of the carrier's position"); *Bellefonte Reinsurance Co. v. Volkswagenwerk A G*, 476 N.Y.S.2d 890, 893-894 (N.Y. App. Div. 1984).

Even now, American Home does not dispute that any alleged failure to disclaim by Republic and United National necessarily occurred after the settlement, full satisfaction and release of all claims against Mobile Gas. Therefore, American Home cannot demonstrate any basis for disturbing the Second Circuit's findings that there was no prejudice to the insured Mobile Gas. (R. 47.) (A. 11-12.)

CONCLUSION

For all the foregoing reasons, Republic and United National respectfully ask this Court to deny American Home's Petition for a Writ of Certiorari.

Dated: New York, New York
May 24, 1993

Respectfully submitted,
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